United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19187

DAVID A. DURST,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

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Appeal In Forma Pauperis from a judgment of the United States District Court for the District of Columbia.

Submitted on the Briefs

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STATEMENT OF QUESTIONS PRESENTED

1. Did the Court err in refusing to direct a verdict of acquittal for the appellant as to the charge of petty larceny?

2. Did the Court err in allowing a verdict of guilty as charged to stand, when on the evidence, appellant was not guilty as a matter of law?

3. Did the Court err in telling the jury not to be concerned about a conflict in testimony as to how many bottles of whiskey were allegedly stolen, so as to arbitrarily, unilaterally and unlawfully, deprive the appellant of the reasonable doubt which this conflict of testimony gave him.

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Appeal In Forma Pauperis from a Judgment of the United States District Court for the District of Columbia Filed November 20, 1964. Submitted Submitted on the Briefs. Submitted on the Briefs

JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked under terms of Title 28, Section 1291, U.S. Code.

STATEMENT OF FACTS IN THE CASE

The appellant was arrested and later indicted, along with Joseph Puleo, for housebreaking, larceny, and attempted housebreaking. They pleaded "Not Guilty" and were tried by jury. The jury was unable to agree on a verdict as to Joseph Puleo but found the appellant guilty as charged.

During the course of the trial, the court denied appellant's motion for a directed verdict of acquittal, although, on the evidence the appellant was entitled to same as a matter of law. The verdict of guilty, on the evidence as a whole, was contrary to the weight of evidence and erroneous as a matter of law. It was patent error not to set it aside.

In its charge to the jury, the court erroneously invaded their lawful province, this depriving appellant of his right to a trial by jury, by deliberately telling them to ignore conflicts in the testimony of government witnesses, which conflicts helped to create a reasonable doubt.

The appellant was sentenced to a term of from one to three years years imprisonment, and had his motion to proceed in forma pauperis denied by the District Court and granted by the Court of Appeals, which also assigned the attorney preparing this brief.

ARGUMENT AND CONCLUSION

I. THE COURT ERRED IN REFUSING TO DIRECT A VERDICT OF ACQUITTAL OF PETTY LARCENY.

The gist of the Government's case-in-chief against the appellant, was the testimony of arresting officer Ted. E. Thanos. Only he testified as to what appellant was allegedly doing at the scene of the alleged crime. His testimony, full of conjectures, half-truths, and contradictions was inconclusive, and the Government's case was legally insufficient, entitling the appellant to a directed verdict.

Thanos' very first mention of a defendant's name was in the context of a conjecture (T22,23) and soon after, another conjecture (T27), and

then another (T48, 49) (as to the all important four bottles of whiskey. His obvious bias was brought out by his testimony at the close of cross-examination (T51). His testimony as to the lighting of the place of the alleged crime was confusing and unbelievable as a matter of law. At one point he stated that the alley lights lit the alley up (T38), then that the street lights did it (T44). He also stated that the lot was "well lit" (T43), but it was also dark (T44).

So that when he testified as to what he saw the appellant doing, and again conjectured and came to guess conclusions as to what was happening, his testimony was unbelievable (T47, 48)

"Q. Now, you say you went in the store you found Durst with a bottle of whiskey in each hand?

A. That's correct.

Q. Where did the third bottle come from?

A. He had that under his arm at the time. He looked like he was ready to leave when I was coming in." (emphasis supplied)

This witness, all to ready to come to conclusions, was the only person linking appellant with the "taking and carrying away" which is an essential element of the crime of larceny. He stated that appellant "looked like" he was about to leave. As to this testimony, it might truly be said, falsum in unum, falsum in toto.

Thus, the Government's evidence as to the crime of petty larceny was legally insufficient and a directed verdict as to that charge properly lay.

II. THE COURT ERRED IN ALLOWING A VERDICT OF GUILTY AS CHARGED TO STAND, WHEN ON THE EVIDENCE, APPELLANT WAS NOT GUILTY AS A MATTER OF LAW.

The court is referred to the transcript as a whole as to this point.

III. THE COURT ERRED IN TELLING THE JURY NOT TO BE CONCERNED AS TO HOW MANY BOTTLES OF WHISKEY WERE ALLEGEDLY STOLEN, SO AS TO ARBITRARILY, UNILATERALLY AND UNLAWFULLY, DEPRIVE THE APPELLANT OF THE REASONABLE DOUBT WHICH THIS CONFLICT OF TESTIMONY GAVE HIM.

The court instructed the jury that "...you are not to be concerned with four bottles that are missing. That is immaterial...." (TR176). Counsel pointed this out to the court, stating that the missing four bottles were relevant as to the question of credibility and was overruled (TR192). In so instructing, the court unlawfully invaded the proper province of the jury, so as to unlawfully deprive the appellant of his right to a trial by jury. In view of the aforementioned inconsistencies in the testimony of the Government's witness in chief, who also, testified in rebuttal against the appellant as to the all important issue of drunkenness, this error was predjudicial. It operated to deprive the appellant of "reasonable doubt." If the jury were allowed to consider that testimony, they might have disbelieved Officer Thanos' testimony and believed the appellant when he said he was drunk. Thus, they would have found him "not guilty" because of the impossibility of his forming the requisite intent which is an essential element of the crimes charged.

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WHEREFORE, appellant urges this Honorable Court to reverse the Court below and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 14, 1965, I served a copy of the aforegoing brief on the U.S. Attorney for the District of Columbia, by hand - delivering a copy of the same at his office in the U.S. Court House, Washington, D.C.

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,187

DAVID A. DURST, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
VICTOR CAPUTY,
PATRICK H. CORCORAN,
Assistant United States Attorneys.

Cr. No. 556-64

QUESTIONS PRESENTED

In the opinion of the appellee the following questions are presented:

1) Did the evidence establish the element of asportation in the crime of petit larceny?

2) Did the court erroneously invade the province of the jury to determine the credibility of witnesses by an instruction concerning the value of the property taken?

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TABLE OF CASES

OTHER REFERENCES

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a three count indictment filed on June 22, 1964, David A. Durst and a co-defendant, Joseph A. Puleo, were charged with attempted housebreaking, housebreaking and petit larceny.[1] A jury, on September 30, 1964, returned a verdict as to appellant of guilty on all three counts. By judgment and commitment filed November 20, 1964, Judge Curran sentenced appellant to a term of from one (1) year to three (3) years imprisonment. This appeal followed.

[1] 22 D.C.C. §§ 103, 1801, 2202.

Charles Soloman, secretary-treasurer of Soloman's Caterers, Incorporated, doing business at 22 Kennedy Street, Northwest, in the District of Columbia, testified that on April 10, 1964, he closed the above place of business at five o'clock. Returning about 11:30 p.m. or 12:00 p.m. that night, he found the rear door to the premises, which had been in "good shape" at the time of closing, "opened and smashed up quite a bit", and the interior "a mess". He ascertained that seven bottles of Vodka and Old Crow were missing, having a value of some $35.00 (Tr. 4-7).

Charles D. Kothe, vice-president and secretary of the Potomac Rubber Company, a corporation doing business at 24 Kennedy Street, Northwest, in the District of Columbia, testified that on the night of April 10, 1964, about 12:00 or 12:30, in response to a telephone call he went to the place of business where he "found the rear door—the facing had been taken off and had been pretty badly beaten up". The condition of the place had been "first class" when closed (Tr. 8-10).

Michael L. Griffin, working as manager of the Texaco Station located at 5420 New Hampshire Avenue, Northwest, approximately one block from 22 and 24 Kennedy Street, testified that he was working on the night of April 10, 1964. He observed appellant, the co-defendant, and a third person seated in a 1955 Dodge with Maryland license number DS-7187 on the north side of the service station. They left the service station, went west on Kennedy street, and then turned into an alley behind 22 and 24 Kennedy Street. Griffin telephoned the police (Tr. 11-15).

Detective Sergeant Ted E. Thanos of the Metropolitan Police Department testified that he was on duty the night of April 10, 1964, and in response to a telephone call proceeded to the unit block of Kennedy Street, Northwest. He observed a 1955 Dodge Sedan with Maryland license DS-7197 in a parking lot beside 24 Kennedy Street. Several cruisers were posted in different sections observing the vehicle, and Thanos parked in the alley, observing the rear of 22 and 24 Kennedy Street. After a few min-

utes he saw the co-defendant approach the rear of the Dodge with two long objects in his hand, open and close the trunk, and then place the objects in the car. Officers Thanos and Officer Walter left their cruisers and placed the co-defendant under arrest. Under the front seat of the car Thanos found two crowbars with fresh paint chips on them, and crowbars, punches and a sledge hammer in the car trunk. In the company of other officers Thanos went to the rear of 22 Kennedy Street and found that the door had been forced and was unlocked. Drawing his service revolver, he entered the premises and found appellant some 10 or 15 feet from the door with a bottle of whiskey in each hand and one under his arm. Appellant was placed under arrest. Also taken from appellant's possession was a pair of gloves he was wearing and a small flashlight (Tr. 18-26, 31-33, 48).

Detective Thanos transferred the two crowbars (Government Exhibit 5) he had found under the front seat of Puleo's car to an agent of the Federal Bureau of Investigation. He also took paint chips and screws (Government Exhibit 6) from the rear door of Soloman's Caterers, 22 Kennedy Street, and a piece of wood (Government Exhibit 7) from the rear door of 24 Kennedy Street and gave them to agent Heiberger (Tr. 29-31).

Henry B. Heiberger, special agent of the Federal Bureau of Investigation assigned to the Washington, D.C., laboratory as a chemist, testified that he received Government Exhibits 5, 6 and 7 on April 15, 1964, from Detective Thanos, examined them, and returned them to Detective Thanos the day of trial. By examination he determined that paint chips on Government Exhibit 6 consisted essentially of three layers of paint, a dark blue top layer, a white middle layer, and a grey primer bottom layer. Government Exhibit 7 was covered with two layers of dark enamel paint. On Government Exhibit 5, the two crowbars, he discovered similar crushed particles of paint which differed from the grey paint that covered the tools. He concluded that these particles could have come from the same surface as that of Government Exhibits 6 and 7 (Tr. 68-72).

Officer Morton J. Walker, assigned to Police Headquarters, General Assignment Squad, corroborating Officer Thanos, testified that he was on duty the night of April 10, 1964, and participated in a stake out of 22 and 24 Kennedy Street, N.W., and that appellant at the time of his arrest was in 22 Kennedy Street with two bottles of whiskey in his possession, one in each hand (Tr. 55, 60-61).

The defense offered three witnesses, the co-defendant Puleo, appellant and Frank Magnotto. Their testimony, in essence, was that all three were together at Buzz's Inn about 3:00 o'clock on the afternoon of April 10, 1964. They remained there until about 7:30 that evening, and appellant had several beers. Leaving Buzz's Inn, they drove to the Alpine on Kennedy Street, appellant driving with Puleo and Magnotto taking his own car. Puleo parked his car in the lot on Kennedy Street where he was subsequently arrested. At the Alpine appellant had several more drinks, zombies (Tr. 75-77, 117-119, 142-143). Their testimony indicated that appellant was intoxicated. Sometime between 10 p.m. and 11 p.m. Puleo and Magnitto walked up to another bar on Kennedy Street to meet some girls. The girls were not present, and after having a drink they returned to the Alpine to find appellant gone. They decided to go home, Magnotto taking his car and Puleo returning to his car where he was arrested (Tr. 78-80, 144-145).

Appellant did not remember how he entered 22 Kennedy Street, but he did remember being inside, taking some whiskey out, and being arrested inside with three bottles of liquor in his possession, one in each hand and one under his arm. He recalled wearing gloves, which he stated he found inside, and also of possessing a small flashlight (Tr. 122, 125-129, 139).

Officers Thanos, Walker, and Winfred E. Dennam were called in rebuttal and testified that both Durst and Puleo were sober at the time of their arrest (Tr. 166, 169-170, 174).

STATUTES INVOLVED

Title 22, D. C. Code, Section 103 provides:

> Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by this title, shall be punished by a fine not exceeding one thousand dollars or by imprisonment for not more than one year, or both.

Title 22, D. C. Code, Section 1801 provides:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, D. C. Code, Section 2202 provides:

> Whoever shall feloniously take and carry away any property of value of less than $100, including things savoring of the realty, shall be fined not more than $200 or be imprisoned for not more than one year, or both. And in all convictions for larceny, either grand or petit, the trial justice may, in his sound discretion, order restitution to be made of the value of the money or property shown to have been stolen by the defendant and made way with or otherwise disposed of and not recovered.

SUMMARY OF ARGUMENT

The element of asportation in the crime or petit larceny is here manifest from the testimony of appellant and Officer Thanos that appellant was arrested inside 22

Kennedy Street, N.W., with the liquor bottles in his hands.

The Court did not infringe upon the jury's province of determining the credibility of the witnesses by instructing that the missing four bottles were immaterial with regard to the value of the property taken. The testimony of appellant and Officer Thanos was in accord as to the number of bottles in appellant's possession at the time of his arrest. The credibility of the witnesses and the question of whether appellant had the specific intent to commit the crime, could be resolved only on other and inconsistent testimony including that relating to the question of whether or not appellant was intoxicated.

ARGUMENT

I. The evidence established the element of asportation in the crime of petit larceny.

(See Tr. 21, 23-25, 35-41, 48, 60-61, 124-129)

Appellant maintains that the evidence failed to establish the element of asportation essential to the crime of petit larceny. The contention is frivolous. Both Officer Thanos and Officer Walker testified that appellant was arrested inside 22 Kennedy Street with the liquor bottles in his hands (Tr. 24-25, 48, 60-61).[2] Appellant himself

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[2] Appellant asserts that the testimony of Detective Sergeant Ted E. Thanos . . . "full of conjecture, half-truths, and contradictions was inconclusive . . .", that he was obviously biased, and that his testimony as to what he saw appellant doing "was unbelievable." Appellee requests this Court to disregard these remarks as unsupported either in appellant's brief or by any fair reaching of the record. The "obvious bias" appellant refers to is the testimony of Officer Thanos that he took only those tools from the trunk of Puleo's car that could be used in a housebreaking and did not take other tools, automotive tools (Tr. 51). As to appellant's contention that Officer Thanos' testimony concerning the lighting at the scene of the crime was "confusing and unbelievable as a matter of law", at the direction of defense counsel Officer Thanos diagramed the area, and it is apparent from this, and his previous testimony, that there was a backyard between the alley and the rear of 22 and 24

corroborated this testimony (Tr. 124-129). The slight movement of property requisite to satisfying the element of asportation is here manifest. *Groomes* v. *United States*, 155 A.2d 73 (D.C. App. 1959); see 52 C.J.S., Larceny, § 6(b), p. 802.

II. The Court's instruction concerning value did not invade the jury's province of determining the credibility of the witnesses.

(Tr. 7, 24-25, 47-49, 61, 125-129, 176, 192)

Appellant contends that the Court's instruction concerning four missing bottles 'unlawfully" invaded the jury's province thereby "unlawfully" depriving appellant of his right to trial by jury. Further, that it was prejudicial error, operating to deprive appellant of "reasonable doubt", and that if the jury had been allowed to consider the testimony they might "have disbelieved Officer Thanos' testimony and believed the appellant when he said he was drunk." Factual clarification is necessary to comprehend this contention.

Mr. Soloman testified that when he went to his place of business, 22 Kennedy Street, N.W., on the night of April 10, 1964, he discovered seven bottles of liquor missing (Tr. 7). Detective Thanos testified that when he arrested appellant in the above premises appellant had a bottle of whiskey in each hand and one under his arm. In response to questions by defense counsel Detective Thanos stated that he did not know what happened to the other four bottles (Tr. 24-25, 47-49). Officer Walker testified that appellant had a whiskey bottle in each hand at the time of his arrest (Tr. 61). Appellant stated that he took some whiskey out of 22 Kennedy Street and that he was arrested inside with a bottle in each hand and one under his arm (Tr. 125-129). This

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Kennedy Streets, as well as other buildings in the block. Further, that the alley was well lighted by street lights located in the alley, although Thanos could not indicate their exact position, but that it was dark in certain areas of the backyards (Tr. 21, 23, 35-44).

comprised the entire testimony as to the number of bottles involved.

In his argument to the jury defense counsel apparently mentioned (counsel's argument to the jury is not included in the record on appeal) the above detailed testimony concerning the bottles. The Court instructed the jury, "That is known as the crime of petit larceny. And while I am on that count you are not to be concerned with four bottles that are missing. That is immaterial just so long as the value of the property alleged in the second count is less than a hundred dollars, for if it were a hundred dollars or more, it would be grand larceny. They are not charged with grand larceny" (Tr. 176). Defense counsel objected to this instruction; ". . . I think they (the jury) should be concerned about it, not because they make up the value, but as a question of credibility—where they are and what happened in the Government's case" (Tr. 192).

Appellant, then, attacks this instruction as to value as depriving the jury of facts to be weighed in determining the credibility of the witnesses. The only defense interposed was intoxication. To sustain this defense appellant, the co-defendant and Magnotto offered testimony. To rebut the Government offered the testimony of Officers Thanos, Walter and Dennam. The question then became one of fact for the jury to determine on the basis of the credibility it accorded to the witnesses involved. See *Womack* v. *United States*, —— U.S. App. D.C. ——, 336 F.2d 959 (1964); *Heideman* v. *United States*, 104 U.S. App. D.C. 128, 259 F.2d 943 (1958), *cert. denied*, 359 U.S. 959 (1959); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837, *rehearing denied*, 331 U.S. 869 (1947). There was no variance between the testimony of Officer Thanos and appellant as to the number of bottles in appellant's possession at the time of his arrest. Consequently, on this fact no issue of inconsistency to be resolved by the jury's determination of credibility was presented. Only on other and inconsistent testimony as to appellant's state of intoxication could the question of credibility and of specific

intent or no specific intent be resolved. The explanatory instruction of the Court as to value did not invade this province of the jury.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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